

89-2028

No.

(1)

Supreme Court, U.S.
FILED

APR 23 1990

JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

RICHARD LEE SANDS - - - - - Petitioner

versus

COMMONWEALTH OF KENTUCKY - - Respondent

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

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Counsel for Petitioner

Petition for Writ of Certiorari Filed: _____



QUESTION PRESENTED FOR REVIEW

Whether an estranged wife could give consent to a search of her sister-in-law's home in which the wife did not reside so as to deny the Petitioner's 4th Amendment Rights against unlawful search and seizure.

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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

RICHARD LEE SANDS - - - - - *Petitioner*

v.

COMMONWEALTH OF KENTUCKY - - - *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE UNITED STATES

Petitioner, RICHARD LEE SANDS, respectfully prays that a Writ of Certiorari issues to review the opinion of the Kentucky Court of Appeals entered on November 3, 1989 and the Supreme Court of Kentucky's Order denying discretionary review on March 7, 1990.

OPINION BELOW

The opinion of the Kentucky Court of Appeals was rendered on November 3, 1989. Unpublished. Motion for Discretionary Review was denied March 7, 1990.

JURISDICTION

The Opinion of the Kentucky Court of Appeals was entered November 3, 1989. Motion for Discretionary Review to the Supreme Court of Kentucky was denied on March 7, 1990. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing a place to be searched, and the persons or things to be seized.

STATEMENT OF THE CASE

On April 15, 1988, Alice Sands, the Petitioner's estranged wife, executed a consent to search form so that the Jefferson County Police Department could search the residence of Petitioner's sister's home located at 4102 Wilmouth Avenue, Louisville, Kentucky. (August 15, 1988; 14:42:54). In this search, the police obtained a truck which had been reported stolen.

A suppression hearing was conducted by the Trial Court on June 16, 1988, to determine whether Alice Sands had the authority to consent to a search by the police of the house, garage, and a white Toyota truck. (Suppression Hearing, June 16, 1988; 11:22:40 - 12:26:29). Ms. Sands was called by the Commonwealth to testify at this hearing and the Trial Court advised her of her right to remain silent. (Suppression Hearing, June 16, 1988; 11:22:40 - 11:23:42). She waived her right to remain silent and testified that the Petitioner's residence is 4102 Wilmouth Avenue and that she lived with him there during their marriage. (Suppression Hearing, June 16, 1988; 11:24:22 - 11:24:39). On cross-examination by defense Counsel, Ms. Sands admitted

that her name is not on the deed to the house and that the deed is dated prior to her marriage to the Petitioner. (Suppression Hearing, June 16, 1988; 11:39:04 - 11:39:38). She further conceded that in December, 1987, she executed a change of address form from the post office and that she then lived with her mother or at the Spouse Abuse Center. (Suppression Hearing, June 16, 1988; 11:32:06 - 11:35:00). She testified that when she filed for divorce in 1988 she used her mother's address. (Suppression Hearing, June 16, 1988; 11:39:48 - 11:40:20). She told the Court that the Judge in her divorce action had signed an order for her to remove her belongings from the Wilmouth Avenue address prior to April 15, 1988, which is the date of the search. (Suppression Hearing, June 16, 1988; 11:41:50).

Sergeant Chesser of the Jefferson County Auto Theft Division then testified that Ms. Sands told him that she owned this house and that he believed her to be the owner where he conducted the search. He admitted that he did no further investigation to verify whether she was the owner. (Suppression Hearing, June 16, 1988; 11:53:50 - 11:58:40).

The Petitioner testified that he stayed at the Wilmouth address during 1988 while he was recuperating from surgeries. (Suppression Hearing, June 16, 1988; 12:03:26). He testified that Ms. Sands had not lived there since early November, 1987. (Suppression Hearing, June 16, 1988; 12:00:53 - 12:01:17). He further testified that Ms. Sands had removed her belongings from the house prior to April, 1988. (Suppression Hearing, June 16, 1988; 12:04:50 - 12:05:20). He also stated that Ms. Sands had stolen the key from him which she used to gain access to the premises in question (Suppression Hearing, June 16, 1988; 12:02:10 - 12:02:20).

Bobbi Sue Trulock, the Petitioner's sister, testified that the deed is in her name. She told the Trial Court that the Petitioner lived at that address with her after his surgeries because she is a nurse's aid. (Suppression Hearing, June 16, 1988; 12:10:45 - 12:14:01). On cross-examination by the Commonwealth, Ms. Trulock stated that Ms. Sands removed her belongings from the residence on December 2, 1987, and that Ms. Sands had no belongings there on April 15, 1988. (Suppression Hearing, June 16, 1988; 12:16:12 - 12:16:30).

The Trial Court in the present case erroneously concluded that the Petitioner had no proprietary interest in the residence, thus, he did not have standing to contest the search. (Suppression Hearing, June 16, 1988; 12:25:50). The Trial Court further found that Ms. Sands had a sufficient relationship to the residence to consent to the search. (Suppression Hearing, June 16, 1988; 12:26:09 - 12:26:29).

The Kentucky Court of Appeals in affirming the Trial Court's decision, found similarly in stating:

First, Appellant lacked the necessary privacy and property interest in the premises in the case at bar to object to Alice Sands' consent for the police to search. Appellant did not own or lease the house . . . (secondly,) even if Appellant did have a sufficient interest to complain, Mrs. Sands in this case can claim an equal interest in the premises. She, like her husband, did not own the property but had lived there with him off and on . . . in this case, she seemed to have common authority over premises and effects . . . finally, the police in this case reasonably believed that Mrs. Sands had authority to give consent for the search. The officers relied in good faith on her statements. Her statement, combined with the fact that she possessed keys to the house and garage, and the

fact that no one else was staying at the house at that time, justified the police officers' reliance. "Evidence is not to be suppressed under the exclusionary rule where the police discover it through actions taken through *good faith* and *reasonable conduct*." *United States v. Williams*, 622 F. 2d 830 (5th Cir. 1980). (Emphasis Added).

REASON FOR GRANTING THE WRIT

This Writ should be granted because the Kentucky Court of Appeals refused to follow the law for determining when a legitimate expectation of privacy exists in premises, and who may consent to the search of those premises. The Supreme Court of Kentucky having denied discretionary review of this matter, the Petitioner now moves this Court to settle these questions.

The Kentucky Court of Appeals, in its decision in this case, upheld the Trial Court's determination that the Petitioner had no proprietary interest in the premises where he resided, thus having no standing to contest the issue of consent. Further, the Kentucky Court of Appeals determined that even if the Petitioner did have such a privacy interest, his estranged wife, who no longer resided at the residence in question, had sufficient authority to grant the consent. Failing that, the Appellate Court determined that in any event, since the officers acted in good faith, believing that the estranged wife's consent was valid, the warrantless search was valid. The Supreme Court of Kentucky denied discretionary review in this case. The Petitioner contends that these three findings of the Kentucky Court of Appeals are erroneous.

Beginning at the Trial Court level, the Petitioner has argued that his Fourth Amendment right against unreasonable searches and seizures has been violated by the

police search of the property at which he resided. This Fourth Amendment argument has three prongs; namely, the issue of consent, the issue of standing, and the issue of whether the officers' acting in good faith is sufficient to override the Fourth Amendment considerations.

First, in regard to the issue of consent, the question in this case is whether Ms. Sands, the Petitioner's ex-wife, and a non-resident of the premises in question, had the right to give consent to the search of the premises and property involved in this case. In *United State v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 933, 39 L. Ed. 2d 242 (1974), this Court stated: "(e) Consent to a search may be given by a third party who has 'common authority over or other sufficient relationship to the premises or effects sought to be inspected.'" There is absolutely no question in the case at hand but that Ms. Sands did not have common authority over the premises in question because common authority signifies some type of ownership or possessory right which neither Ms. Sands nor the Petitioner possessed since the property actually belonged to the Petitioner's sister. The remaining issue then is whether Ms. Sands had any other sufficient relationship to the property or to the objects searched. Since in December, 1987, she executed a change of address form establishing her residence at some place other than the Wilmouth Avenue address, and because Ms. Sands removed her belongings from the residence on December 2, 1987, it is obvious that she had no relationship with the property or objects which were subjected to the unlawful search pursuant to her alleged consent. Further, since the key that she used to gain entrance to the premises in question was stolen from the Petitioner (Suppression Hearing, June 16, 1988; 12:02:10 - 12:02:20), even the means by which her consent was actuated indicates her lack of

relationship to the premises in question. The Third Circuit Court of Appeals in a case very similar to the case at bar held that the wife did not have authority to consent to the search and thus the defendant's Fourth Amendment rights in that case were violated. See *United States v. Mazurkiewicz*, 431 F. 2d 839 (3rd Cir. 1970).

The Kentucky Court of Appeals in its decision rendered November 3, 1989 stated that the Petitioner did not have standing to challenge the search since he, "lacked the necessary privacy and property interest in the premises in the case at bar to object to Alice Sands' consent to the police search." (See page 3 of the Kentucky Court of Appeals decision.)

In regard to the Toyota truck which was searched, there is no contradiction to the fact that the Petitioner owned this motor vehicle and therefore had a sufficient relationship to this object to have standing to object to an illegal search. In regard to his sister's house, it was not contested at trial, nor at any time subsequent thereto that the Petitioner lived at the Wilmouth Avenue address with the consent of his sister. The Petitioner had lived at his sister's residence for a substantial amount of time during his marriage to Ms. Sands, primarily because of major surgeries which he had undergone. The Petitioner's sister is a nurse's aid, and as such provided necessary care to the Petitioner. (Suppression Hearing, June 16, 1988; 12:10:45 - 12:14:01). Since the Petitioner resided in this home subsequent to December 2, 1987, he clearly was a person in charge of the house during times when his sister was not there. Therefore, only he and his sister, the record owner of the property, had the right to consent to the search of the Wilmouth Avenue residence and the objects contained therein. Conversely, since Ms. Sands did not reside at

this property subsequent to December 2, 1987, she had no relationship with the property in question, and therefore had no right to consent to the search of the property on April 15, 1988. Therefore, the Kentucky Court of Appeals' determination that the Petitioner did not have standing to object to his ex-wife's consent to the search in question was erroneous.

Finally, the Kentucky Court of Appeals makes an interesting, although erroneous, statement regarding the officers' conduct in the present case. The Court states, "Finally, the police in this case reasonably believed that Ms. Sands had authority to give consent for the search. The officers relied in good faith on her statements . . . Evidence is not to be suppressed under the exclusionary rule where the police discover it through actions taken through good faith and reasonable conduct." Under *United States v. Leon*, 468 U.S. 897, 104 S. Ct. 3405, 82 L. Ed. 2d 677 (1984), the good faith exception to the exclusionary rule only applies to search warrants. It does not apply to the case at hand; a case involving consent. In essence, the Court of Appeals seems to be saying that regardless of whether the ex-wife had the right to consent, this error was nullified by the police officers' good faith belief in her ability to consent. *Leon, supra*, has never been expanded to such a degree as to incorporate the facts of this case. The Kentucky Court of Appeals cites *United States v. Williams*, 622 F. 2d 830 (1980), in support of its position. However, even if one could argue that this case is applicable on its facts, and since *Williams, supra*, deals with the good faith belief in the DEFENDANT'S conduct; this point is arguable; the officers in this case were not reasonable because they failed to perform even a perfunctory investigation into Ms. Sand's right to give consent.

CONCLUSION

Petitioner's case presents an opportunity for this Court to set a more fixed rule in regard to who may consent to the search of another's property. Further, because the decision of the Kentucky Court of Appeals and the denial of Discretionary Review by the Kentucky Supreme Court erroneously interprets the Petitioner's Fourth Amendment rights a Writ of Certiorari should be issued to review the opinion of the Supreme Court of Kentucky and the Kentucky Court of Appeals.

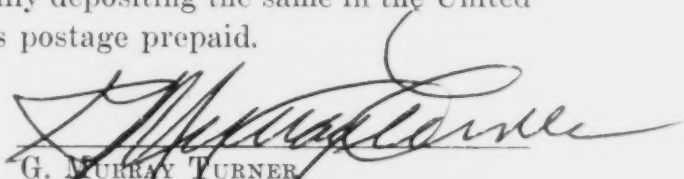
Respectfully submitted,

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Counsel for Petitioner

CERTIFICATE OF SERVICE

I, G. Murray Turner, Counsel for Petitioner, certify that the attached Petition for Writ of Certiorari, Appendix, and Notice of Appearance was mailed to the Office of the Clerk of the United States Supreme Court, Washington, D.C. 20543, and to Counsel for Respondent, Mr. Frederic J. Cowan, Attorney General, Commonwealth of Kentucky, Office of the Attorney General, State Capitol Building, Frankfort, Kentucky 40601, this 25 day of June, 1990, by personally depositing the same in the United States Mail, first class postage prepaid.



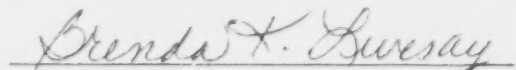
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State of Kentucky }
 County of Jefferson }

Subscribed, sworn to and acknowledged before me, a Notary Public, this 25 day of June, 1990 by G. Murray Turner.

My commission expires: 10/2/92


 Notary Public, State at Large, Ky.

NOTICE OF APPEARANCE

The Clerk will enter my appearance as Counsel for Petitioner. I certify that I am a member of the Bar of the United States Supreme Court. The Clerk is requested to notify the undersigned of action by the Court by regular mail.

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APPENDIX



APPENDIX A
SUPREME COURT OF KENTUCKY

89-SC-872-D
(88-CA-2420)

RICHARD LEE SANDS - - - - - - *Movant*

v.

Jefferson Circuit Court
88-CR-713

COMMONWEALTH OF KENTUCKY - - - *Respondent*

ORDER DENYING DISCRETIONARY REVIEW

The motion for review of the decision of the Court of Appeals is denied.

ENTERED March 7, 1990.

(s) Robert F. Stephens
Chief Justice

APPENDIX B

RENDERED: NOVEMBER 3, 1989; 3:00 P.M.
NOT TO BE PUBLISHED

COURT OF APPEALS OF KENTUCKY

No. 88-CA-2420-MR

RICHARD LEE SANDS - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

Appeal from Jefferson Circuit Court
Hon. Benjamin F. Shobe, Judge
Action No. 88-CR-713

AFFIRMING

BEFORE: DYCHE, ELSWICK and HOWARD, JUDGES.

HOWARD, JUDGE. Appellant, Richard Lee Sands, appeals from a conviction in the Jefferson Circuit Court for one count of receiving stolen property and two counts of obscuring the identity of a machine. Appellant received a one-year sentence on the receiving-stolen-property conviction and a three-year sentence on each of the obscuring-the-identity-of-a-machine convictions. These sentences were then enhanced by a jury to ten-year sentences on finding appellant guilty as a persistent felony offender in the first degree. The trial court ran the ten-year sentences concurrently, thus appellant was sentenced to ten years as a persistent felony offender.

On March 14, 1988, David Dierson reported that his white Toyota truck was missing. The truck and the tools

that were in it were valued at more than \$9,500. On April 15, 1988 appellant's now ex-wife, Alice Sands, contacted the Commonwealth Attorneys' office and the Auto Theft Division of the Jefferson County Police Department concerning a white Toyota pick-up truck. She grew suspicious about the truck due to the present of a New Jersey license plate in the back of the truck while a Florida license plate was taped to the window of the truck. The truck was in a garage at a house where she and appellant had lived.

Alice Sands executed a consent to search form so that the police could enter the garage and examine the truck. Appellant was not home when the police examined the truck. Detective Lee Gordon of the Jefferson County Police Department found that the two public identification numbers identified a 2-wheel drive truck while the truck was a 4-wheel drive. He and other officers discovered that the truck's two confidential vehicle identification numbers (hereinafter VIN's) differed from the public VIN's. The confidential VIN's identified the truck as the 2-wheel drive truck reported missing by David Dierson.

The two public VINs identified a truck belonging to Steven Smith of Orlando, Florida. Mr. Smith's truck had been totalled in an accident in Clarksville, Indiana in 1987. Evans Imports obtained the wrecked truck from Smith's insurance company and the truck was still on their lot at the time of the investigation. Detective Gordon examined that truck and discovered that the dashboard had been removed and the truck's public VIN's correspond to those of David Dierson's missing truck. An employee of Evans Imports stated that in March of 1988 a man bought the dashboard of the truck. The employee also positively identified appellant as the buyer from a photo-pack shown by the police. He also identified appellant in court.

Appellant first contends that Alice Sands did not have any authority to consent to a police search of the house

and garage. As a result, appellant contends the fruits of the search are inadmissible. We disagree. First, appellant lacked the necessary privacy and property interest in the premises in the case at bar to object to Alice Sands' consent for the police to search. Appellant did not own or lease the house. The house was owned by the appellant's sister, and the utilities and other services were listed in the name of appellant's mother. In cases involving fourth amendment property and privacy interests, the defendant bears the burden of showing that he had a legitimate expectation of privacy in the premises. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S. Ct. 2556, 65 L. Ed. 2d 633 (1980); *Sussman v. Commonwealth, Ky.*, 610 S. W. 2d 608 (1981). Further, the defendant must have an independent privacy interest; his right to privacy has not been invaded just because there has been a seizure of damaging evidence. *United States v. Salvucci*, 448 U.S. 83, 100 S. Ct. 2547, 65 L. Ed. 2d 619 (1980).

Three factors are very important in determining whether the defendant has a legitimate expectation of privacy in the premises. First, the court should determine whether the defendant had a right to exclude others from the property. Next, the court should see if others had free access to the property, and finally, the court should see if the defendant had the expectation that the property item would remain free from intrusion. *Rawlings, supra*, at 2561. In this case, the appellant cannot pass any of these three factors. First, the house and garage did not belong to him. He did possess keys to both the house and garage but so did other members of his family and his wife. Thus, others clearly had free access to the house and garage in this case. Finally, if appellant had an expectation that the garage and the truck would remain free from intrusion, it was not justified. Appellant knew that other family members had keys and could gain entrance to the garage.

He also had shown the truck to his wife and allowed her to ride in it and even to drive it. Due to these facts, it is difficult to imagine that appellant's expectation was truly justified. Appellant assumed the risk of discovery in this case, especially since he let his wife drive and ride in the truck. *Frazier v. Cupp*, 394 U.S. 731, 89 S. Ct. 1420, 1425, 22 L. Ed. 2d 684 (1969). Thus, under this three-factor test, appellant did not seem to have a legitimate expectation of privacy.

Two Kentucky appellate decisions solidify this position. A very similar pattern existed in *Combs v. Commonwealth*, Ky., 341 S. W. 2d 774 (1960). The defendant in that case resided with his grandfather who owned the house. The grandfather allowed the police to search the premises, during which evidence incriminating to the defendant was obtained. The Court held that since all proof showed that the premises belonged to the grandfather, the defendant had no standing to question the validity of the search. In *Smith v. Commonwealth*, Ky., 375 S. W. 2d 242 (1963), the Court refused to sustain the appellant's contention that the search was illegal. The premises searched in that case were not owned by the accused and the place where the damaging item was found not in the area of the dwelling that appellant exclusively occupied. In the case before the Court, the appellant has also failed to assert a deprivation of a sufficient fourth amendment interest.

Even if appellant did have a sufficient interest to complain, Mrs. Sands in this case can claim an equal interest in the premises. She, like her husband, did not own the property but had lived there with him off and on. She also possessed keys to the garage and house. These keys had earlier either been given outright to her by her husband or had been left in a car which he let her borrow and drive. In this case, she seemed to have common authority over premises and effects. The consent of one who possesses

this common authority is valid as against the absent person, in this case, appellant. *United States v. Matlock*, 415 U.S. 164, 171, 94 S. Ct. 988, 993, 39 L. Ed. 2d 242 (1974); *Frazier, supra*, at 1425; *Commonwealth v. Sebastian*, Ky., 500 S.W. 2d 417 (1973); *Butler v. Commonwealth*, Ky., 536 S.W. 2d 139 (1976). By leaving the truck where it was and allowing someone else to use it, appellant assumed the risk that someone else might examine it. *Frazier, supra*.

In consent cases, courts often look at the following three factors: the third party's legal and possessory rights to the items or premises searched, her relationship to the subject of the search, and the circumstances as they objectively appear to the police at the time of the search. *United States v. Grigsby*, 367 F. Supp. 900, 902 (E. D. Ky. 1973). In this case as shown above, Mrs. Sands had equal possessory rights to the property and, as appellant's wife, had a sufficient relationship to the subject of the search, her husband. Finally, the police in this case reasonably believed that Mr. Sands had authority to give consent for the search. The officers relied in good faith on her statements. Her statement, combined with the fact that she possessed keys to the house and garage, and the fact that no one else was staying at the house at that time, justified the police officer's reliance. Evidence is not to be suppressed under the exclusionary rule where the police discover it through actions taken through good faith and reasonable conduct. *United States v. Williams*, 622 F. 2d 830 (5th Cir. 1980). The evidence concerning the stolen truck was properly discovered and admitted in this case.

Appellant secondly argues that the evidence presented in the case before the court was insufficient to convict him of two counts of obscuring the identify of a machine over \$100.00. He asserts that the trial court should have granted his motion for directed verdict. We disagree. KRS 514.120 states: "A person is guilty of obscuring the identity of

a machine or other property when he: (a) Removes, defaces, covers, alters, destroys or otherwise obscures the manufacturer's serial number or any other distinguishing identification number or mark. . . ." The evidence in this case clearly points to the defendant as having obscured and tampered with the VIN's on the truck.

The Kentucky Supreme Court adopted the following test for appellate court review of directed verdict decisions. "If under the evidence as a whole it would not be clearly unreasonable for a jury to find the defendant guilty, he is not entitled to a directed verdict of acquittal." *Commonwealth v. Sawhill*, Ky., 660 S.W. 2d at 3, 5 (1983); *Trowell v. Commonwealth*, Ky., 550 S.W. 2d 530 (1977). In the case at bar, sufficient evidence existed as to defendant's altering the VIN's so that it definitely was not unreasonable for the jury to find the defendant guilty. The police detectives examined the white truck found in the garage and discovered that the public VIN's differed from the confidential VIN's. After further investigation, they discovered that the VIN's matched a truck which had been wrecked and was currently at Evans Imports in the Jefferson County area. Further inquiry yielded that a man positively identified as appellant by the owner of Evans Imports had purchased the dashboard of this wrecked truck. The attendant further testified that the Florida license plate which was on the wrecked truck was missing after appellant removed the dashboard. The white truck found by the police in the garage on Wilmouth had a Florida license plate on it. Further, the police also discovered that the public VIN's found on the wrecked truck at the car lot matched the confidential VIN's of the white Toyota truck found by the police at the garage where appellant had earlier lived. All of this evidence is sufficient to find appellant guilty, and a directed verdict was not appropriate.

The appellant also contends that the introduction of a photopack containing a mug shot of appellant deprived him of a right to a fair trial. In this case the photopack containing six photographs from which the owner of Evans Imports identified appellant was shown to the jury as an exhibit. The trial judge specifically ruled that he would not allow these photographs to be admitted until the numbers were obscured so as not to inflame the jury. The photographs were shown to the jury without any identification numbers on them.

Three standards have been established to test the use of mug shots in a particular case. They are: 1) the prosecution must have a demonstrable need to introduce the photographs, 2) the photos themselves if shown to the jury must not imply that the defendant had a criminal record, and 3) the manner of their introduction at trial must be such that it does not draw particular attention to the source or implications of the photographs. *Redd v. Commonwealth*, Ky. App., 591 S. W. 2d 704, 708 (1979); *United States v. Harrington*, 490 F. 2d 487 (2d Cir. 1973).

Applying this test to the particular facts in the case before the Court and comparing similar cases, the trial court's careful scrutiny of the process of entering the photographs clearly passes the above test. First, the Commonwealth needed to enter the photographs to make the connection between the appellant and the truck found at Evans' Imports. Although the owner of this establishment positively identified the appellant in court, this photopack demonstrated that the car lot owner was able to positively identify appellant not long after he allegedly visited the establishment. The photos here also pass the second prong of the test. The numbers were obscured in such a way so as not to imply any past criminal record and the trial judge made no comments concerning the pictures in front of the jury. Finally, the trial court's cautious method of

entering the pictures satisfies the third condition as well. There was no particular attention drawn to the source or implications of the photographs in front of the jury.

In *Garrett v. Commonwealth*, Ky., 560 S.W. 2d 805 (1978), the Supreme Court was faced with a similar situation. In that case all of the identification marks were removed and the witness also made an in-court identification of the defendant. The court ruled that any error that may have occurred was harmless because of these protective measures. In *United States v. Gimelstab*, 475 F. 2d 157 (3d Cir. 1973), the appellate court ruled that defendants' rights were not violated when the numbers were properly covered. Such is the situation in the case at bar. In *Harrington* and other cases cited by appellant, the identification numbers were either not removed or there were improper comments made by the trial court. In the case before this Court, the trial court acted properly and the photographs were correctly admitted.

Appellant finally contends that the trial court allowed into evidence impermissible hearsay. Appellant specifically objected to statements by Detectives Gordon and Dobbs concerning information they received regarding the confidential VIN's and conversations with Steven Smith, the former owner of one of the trucks. This issue was not preserved for review. The general rule is that the appellant should raise these issues at trial and should not be allowed to raise issues on appeal without preserving them. *Taylor v. Commonwealth*, Ky., 461 S.W. 2d 920 (1970). Under Kentucky Rule of Criminal Procedure 10.26, an appellate court may review an error even though it is insufficiently raised or preserved for review as long as the error is palpable and affects to substantial rights of a party.

Appellant has failed to show that the error in this case was palpable and should be considered by this Court pursuant to RCr 10.26. While some of the evidence objected

to by appellant is hearsay, it was harmless. The evidence primarily dealt with the location of the VIN's and with the former owner of the wrecked truck. None of these conversations had a direct bearing on the outcome of the case. Accordingly, appellant is not entitled to relief on this issue.

The judgment of the Jefferson Circuit Court is affirmed.

ALL CONCUR.

Attorney for Appellant:

DAVID KAPLAN

Louisville, Kentucky

FREDERIC J. COWAN, Atty. Gen.

LANA GRANDON, Asst. AG

DAVID A. SEXTON

Frankfort, Kentucky

APPENDIX C
JEFFERSON CIRCUIT COURT

DIVISION FIFTEEN

No. 88CR0743
88CR0713

COMMONWEALTH OF KENTUCKY - - - - *Plaintiff*

v.

RICHARD LEE SANDS aka THEODORE CONRAD
(CONDER, CONNE CONDAR CONNER) TRULOCK,
TRULOCK WILLIAM JOSEPH - - - - *Defendant*

**JUDGMENT OF CONVICTION AND SENTENCE
ORDER GRANTING OR DENYING PROBATION**

AT A COURT HELD Sept. 30, 1988.

Came the defendant, and his counsel, David Kaplan and the Commonwealth by counsel, Vince Eiden.

The defendant on August 16, 1988, having appeared in open Court with his/her attorney, by agreement with the attorney for the Commonwealth, withdrew his/her plea of not guilty and entered a plea of guilty to RSP 0/100 Obsc. the Id. of Mach. Obsc. of Id. of Mach. PFO I as charged in the Indictment and the Court having found the plea to be freely, voluntarily and intelligently made; and further that the defendant fully understands the nature of the charges as well as the consequences of his guilty plea; and further that the defendant has had the advice and counsel of a competent lawyer with whom he/she said he/she is satisfied:

IT IS ORDERED AND ADJUDGED by the Court that the defendant is guilty of RSP 0/100 Obsc. ID. of Mach. Obsc. ID of Mach. PFO I.

This Court now being fully informed of the facts and circumstances surrounding the charge(s) and finding no cause having been shown which would preclude pronouncement of sentence, now, it is the sentence of the law and the judgment of the Court that the defendant be committed to the custody of the Kentucky Cabinet of Corrections to be imprisoned for a term not to exceed RSP 0/100 a term of 1 year Obsc. ID of Mach. 3 yrs. Obsc ID of Mach. 3 yrs. consecutively in lieu of said sentence Via PFO I a term of 10 years to serve with credit of 106 days spent in confinement on the charge(s).

IT IS FURTHER ORDERED AND ADJUDGED that the defendant's Motion that the Court withhold rendition of judgment and place him/her on probation be and the same is hereby overruled because:

- () (1) There is substantial risk that during a period of probation, or conditional discharge, the defendant will commit another crime; or,
- () (2) The defendant is in need of correctional treatment that can be provided most effectively by his commitment to a correctional institution; or,
- () (3) A disposition under this chapter will unduly depreciate the seriousness of the defendant's case.
- () (4) The withholding of rendition of judgment and probation of the defendant is prohibited by law.

IT IS THEREFORE ORDERED that the Jefferson County Sheriff shall deliver the defendant to the custody of the Jefferson County Department of Corrections to be transferred to the Kentucky Corrections Cabinet at such location within this State as the Cabinet shall designate for execution of the judgment pronounced herein.

(s) B. F. Shobe

Date 9/30/88

Benjamin F. Shobe, Judge

Appeal bond set at \$50,000.00 cash or property of twice the amount.

APPENDIX D
JEFFERSON CIRCUIT COURT

FIFTEENTH DIVISION

No. 88CR0743
88CR0713

COMMONWEALTH OF KENTUCKY - - - *Plaintiff*

v.

RICHARD LEE SANDS - - - - - *Defendant*

NOTICE OF APPEAL

Comes the defendant, appellant, Richard Lee Sands, by counsel, pursuant to RCr 1204, and hereby gives notice to the Commonwealth of Kentucky, the plaintiff, appellee of his intention to take an appeal to the Kentucky Supreme Court from the final judgment of this Court entered on September 30, 1988, imposing a sentence of ten (10) years to serve imprisonment.

(s) David Kaplan
David Kaplan
Attorney for Defendant, Appellant,
Richard Lee Sands
550 South Fifth Street
Louisville, Kentucky 40202
(502) 584-0141

CERTIFICATE

This is to certify that a copy of the foregoing was mailed this 24th day of October, 1988 to the Honorable Joseph P. Gutman, Assistant Commonwealth's Attorney, 514 West Liberty Street, Louisville, Kentucky 40202.

(s) David Kaplan
David Kaplan

APPENDIX E

COURT OF APPEALS OF KENTUCKY

No. 88-CA-002420

RLCHARD LEE SANDS - - - - - *Appellant*

v.

COMMONWEALTH OF KENTUCKY - - - *Appellee*

STATEMENT OF APPEAL

The appellant is Richard Lee Sands. The appellee is the Commonwealth of Kentucky.

Counsel for appellant is David Kaplan, 550 South Fifth Street, Louisville, Kentucky 40202. Counsel on appeal for the appellee is Honorable Frederic Cowan, Attorney General of Kentucky, Capitol Building, Frankfort, Kentucky 40601.

The trial Judge was Honorable Benjamin Shobe, Judge, Jefferson Circuit Court, Division Fifteen, Hall of Justice, Louisville, Kentucky 40202.

The judgment appealed from was entered on September 30, 1988, and may be found at pages 243-245 of the record on appeal under Indictment No. 88CR0713.

The Notice of Appeal was filed on October 24, 1988 and may be found at page 249 of the record on appeal under Indictment No. 88CR0713.

The certification of the record by the Clerk was served on November 23, 1988.

The appellant is free on bond.

This is a criminal appeal.

CERTIFICATE

I hereby certify that a copy of the foregoing was mailed to Mr. Tony Miller, Clerk, Jefferson Circuit Court, Hall of Justice, 600 West Jefferson Street, Louisville, Kentucky 40202 and was mailed to Honorable Frederic Cowan, Attorney General, Capitol Building, Frankfort, Kentucky 40601 on December 22, 1988.

G. Murray Turner
Mulhall, Turner & Hoffman
Suite 300
440 S. Seventh St.
Louisville, Kentucky 40203
(502) 584-0141
Attorney for the Appellant



NO. 89-2028 (2)

Supreme Court, U.S.

FILED

JUL 26 1990

JOSEPH F. SPANIOLO, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES
October Term, 1989

RICHARD LEE SANDS

PETITIONER

versus

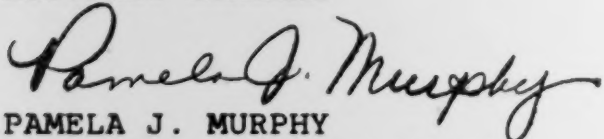
COMMONWEALTH OF KENTUCKY

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

Respectfully submitted,

FREDERIC J. COWAN
ATTORNEY GENERAL



PAMELA J. MURPHY
ASSISTANT ATTORNEY GENERAL
CRIMINAL APPELLATE DIVISION
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494
(502) 564-7600

COUNSEL FOR RESPONDENT

QUESTION PRESENTED

WHETHER A WARRANTLESS ENTRY AND SEARCH BY LAW ENFORCEMENT OFFICERS VIOLATES THE FOURTH AMENDMENT PROSCRIPTION OF "UNREASONABLE SEARCHES AND SEIZURES" WHEN THE ENTRY AND SEARCH ARE BASED UPON THE CONSENT OF A THIRD PARTY WHOM THE POLICE, AT THE TIME OF ENTRY, REASONABLY BELIEVE TO POSSESS COMMON AUTHORITY.



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IN THE
SUPREME COURT OF THE UNITED STATES
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RICHARD LEE SANDS

PETITIONER

versus

COMMONWEALTH OF KENTUCKY

RESPONDENT

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF KENTUCKY

OPINION BELOW

The opinion below is correctly set forth in
petitioner's appendix.

JURISDICTION

The opinion of the Kentucky Court of Appeals
was rendered November 3 1989. The Kentucky
Supreme Court denied Sands' Motion for
Discretionary Review on March 7, 1990. The
jurisdiction of this Court is invoked pursuant to
28 U.S.C. §1257.



CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment to the United States

Constitution which states:

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrant shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing a place to be searched, and the persons or things to be seized.

COUNTERSTATEMENT OF THE CASE

On April 15, 1988 petitioner's estranged wife, Alice Sands, contacted the Commonwealth Attorney's Office and the Auto Theft Division of the Jefferson County Police Department concerning a white Toyota pick-up truck. Ms. Sands told authorities that she became suspicious about the truck due to the presence of a New Jersey license plate in the back of the truck while a Florida license plate was taped to the window of the truck. The truck was in a garage at a house where she and petitioner had lived.



Ms. Sands executed a consent to search form so that the police officers could enter the garage and examine the truck. The officers identified the truck as the truck reported missing by David Dierson on March 14, 1988.

Alice Sands testified that on April 15, 1988 she consented to the search of the house and garage located at 4102 Wilmouth Drive. Sands stated that she was married to the petitioner, that she lived at the house during the marriage and that she had resided at the house off and on. On April 15, 1988 Ms. Sands had personal property at the house and keys to the house and garage. Ms. Sands also had keys to the truck which petitioner told her he bought for her for her birthday.

Police Sergeant Chesser testified that he believed that Ms. Sands' interest in the property was either as an owner or a resident. Ms. Sands told Sergeant Chesser that she was the owner and that she had lived there over a period of time.

Ms. Sands' statements to police were supported by the fact that she had keys to the house and garage in her possession.

On November 3, 1989 the Kentucky Court of Appeals rendered an unpublished opinion affirming petitioner's conviction.

REASON FOR DENYING CERTIORARI

I.

PREVIOUS DECISIONS OF
THIS COURT ARE
CONTROLLING.

In the present case the Kentucky Court of Appeals held: (1) that petitioner did not have a legitimate expectation of privacy in the premises which were searched, and (2) that police reasonably believed that Ms. Sands had authority to give consent for the search. Previous decisions of this Court are controlling in the present case.

In Rawlings v. Kentucky, 448 U.S. 98 (1980) the Court set forth three factors to consider in determining whether a defendant has a legitimate

expectation of privacy in the premises. The three factors are (1) whether the defendant had a right to exclude others from the property, (2) whether other persons had free access to the property, and (3) whether the defendant had the expectation that the property item would remain free from intrusion. The Kentucky Court of Appeals applied the Rawlings test and determined that petitioner did not meet any of the three factors. The house and garage did not belong to Petitioner. Other members of petitioner's family and his wife possessed keys to the house. Based upon the facts before it, the Kentucky Court of Appeals determined that petitioner's expectation of privacy, if any, was not justified. The decision of the Court in Rawlings, supra is controlling and was applied in petitioner's case.

In Illinois v. Rodriguez, ____ U.S. ____ (No. 88-2018 rendered June 21, 1990), this court held that a warrantless entry is valid when based upon the consent of a third party whom police, at the

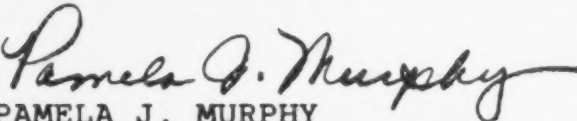
time of entry, reasonably believe to possess common authority over the premises. The Kentucky Court of Appeals held that the police officers reasonably believed that Ms. Sands had authority to give consent for the search. Therefore, the decision of this Court in Rodriguez is controlling.

CONCLUSION

For the above stated reasons, the petition seeking a Writ of Certiorari should be denied.

Respectfully submitted,

FREDERIC J. COWAN
ATTORNEY GENERAL


PAMELA J. MURPHY
ASSISTANT ATTORNEY GENERAL
CRIMINAL APPELLATE DIVISION
CAPITOL BUILDING
FRANKFORT, KENTUCKY 40601-3494
(502) 564-7600

COUNSEL FOR RESPONDENT

CERTIFICATE OF SERVICE

As a member of the Bar of the United States Supreme Court, the undersigned hereby certifies that on the 26th day of July, 1990, three copies of the foregoing Brief in Opposition to Petition for Writ of Certiorari were mailed first-class postage prepaid to Hon. G. Murray Turner, 440 South Seventh Street, Suite 300, Louisville, Kentucky, 40203.


ASSISTANT ATTORNEY GENERAL